

Claimant argues she is entitled to an 18 percent impairment of the right upper extremity and a 17 percent impairment of the left upper extremity. Moreover, claimant contends the evidence shows she is permanently and totally disabled, and respondent failed to rebut this presumption as outlined in K.S.A. 44-510c.

Respondent maintains the ALJ's Award should be affirmed, as the presumption of permanent total disability has been rebutted by both claimant's testimony and that of a qualified expert. Respondent argues claimant returned to work with no restrictions following her surgeries, collected unemployment benefits, and registered for work with a temporary placement agency, thereby showing she is capable of substantial and gainful employment.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant is 51 years of age with a high school education. She began employment with respondent in 2010 as a dual machine operator, a position which required constant use of her hands. Claimant testified she began to experience numbness in her fingers and pain in her wrists which would "shoot" up her arms to her shoulders.<sup>1</sup>

Claimant underwent treatment with Dr. Lintecum for her injuries, including a right carpal tunnel release/right thumb trigger release on July 8, 2011, and a left carpal tunnel release on January 12, 2012. Claimant testified Dr. Lintecum released her to return to work with no restrictions following the second surgery. Claimant returned to full duty for respondent on February 15, 2012, until April 30, 2012, when she was taken off work by her personal physician, Dr. Philip Martin. Dr. Martin referred claimant to Dr. Steven Ruhlman. Neither Drs. Martin nor Ruhlman were authorized by respondent.

Dr. Ruhlman, a physician specializing in rheumatology, examined claimant on May 22, 2012. Claimant complained of pain in her wrists, forearms, elbows, shoulders, and chronic low back pain. Dr. Ruhlman performed a physical examination of claimant, and he testified he found nothing to indicate claimant may or may not have rheumatoid arthritis. He found claimant had positive findings in 17 of 18 fibromyalgia tender points and diagnosed claimant with fibromyalgia. Dr. Ruhlman noted the fibromyalgia was the cause of claimant's hand pain. In a letter dated May 22, 2012, Dr. Ruhlman wrote:

I feel [claimant's hand pain] is part of her fibromyalgia now that the carpal tunnel symptoms have resolved. She has some resentment about work comp which may affect her prognosis for return.<sup>2</sup>

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<sup>1</sup> R.H. Trans. (Mar. 18, 2014) at 12.

<sup>2</sup> Ruhlman Depo., Ex. 1 at 7.

Claimant returned to Dr. Ruhlman in June 2012 and again on August 16, 2012. On August 16, 2012, Dr. Ruhlman assessed claimant with fibromyalgia, sleep disorder, and back pain. He testified claimant did not relay any problems with her hands during this examination. Dr. Ruhlman did not see claimant after August 16, 2012.

Dr. Peter Bieri, a board certified disability evaluator, examined claimant on July 10, 2012, at claimant's counsel's request. Claimant indicated to Dr. Bieri she had continued pain, numbness, and tingling of both hands and wrists, more so on the right, as well as inconstant triggering of both thumbs. Dr. Bieri reviewed claimant's medical records, history, and performed a physical examination of her upper extremities. Dr. Bieri testified the results of claimant's testing were inconsistent with her complaints, as her "responses were not indicative of subjective total loss of sensation."<sup>3</sup> Dr. Bieri found claimant to be at maximum medical improvement (MMI), and using the *AMA Guides*,<sup>4</sup> opined:

Ten percent (10%) upper extremity impairment is awarded bilaterally for residuals of mild entrapment neuropathy at the level of the wrists, with reference to page 57.

Twenty percent (20%) thumb impairment is awarded for residuals of triggering, bilaterally, with reference to page 63. This translates to five percent (5%) upper extremity impairment, bilaterally, with reference to Table 18, page 58.

The combined total right upper extremity impairment would be fifteen percent (15%), and the combined total left upper extremity impairment would be fifteen percent (15%).

The above is directly attributable to injury as reported.<sup>5</sup>

Dr. Bieri recommended the following physical restrictions: only occasional to frequent repetitive gripping and grasping, unilateral lifting limited to 15 pounds occasionally, 10 pounds frequently, and no more than 5 pounds of constant lifting. Dr. Bieri found no additional medical treatment was necessary for claimant. Further, he testified claimant was able to work within restrictions.

In an Order dated September 13, 2012, the ALJ authorized Dr. O. Allen Guinn, III, to perform an independent medical evaluation (IME) of claimant. Dr. Guinn initially examined claimant on September 27, 2012. Claimant complained of hand pain and numbness. Following a review of claimant's medical records, history, and conducting a physical examination, Dr. Guinn concluded, "At this time, the patient's chief problem

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<sup>3</sup> Bieri Depo. at 16.

<sup>4</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>5</sup> Bieri Depo., Ex. 2 at 5.

appears to be thumb CMC arthritis; although, based on her right hand examination, I would suggest that possibly a rheumatoid work-up might be beneficial.”<sup>6</sup> Dr. Guinn recommended claimant return to work at full duty, and if her symptomatology increased, claimant should have a nerve conduction study while exhibiting symptoms. He noted this would provide a more accurate assessment of claimant’s actual condition. In the meantime, Dr. Guinn suggested claimant work with her thumb CMC pain as long as possible before having it treated through her personal health insurance, as the thumb condition was not a work-related problem.

After testing claimant’s grip strength, Dr. Guinn noted claimant had inconsistent effort between the static and alternating grip tests, indicating claimant was self-limiting. Dr. Guinn testified he “actually [does] not know what her actual grip ability is, just that she gave an inconsistent effort between comparing the static versus the rapid alternating.”<sup>7</sup> Further, Dr. Guinn indicated claimant was a limited historian with an inability to stay on topic. He testified:

And when asked a specific question, [she] would basically go off onto tangents and would need to be brought back to the topic and say: I need to have you address this specific issue. And then she would diverge off again. So it was a somewhat challenging history to be obtained.<sup>8</sup>

Dr. Guinn again examined claimant on March 14, 2013, to assess any permanent disability. He did not take claimant’s history during this visit, though he noted in his IME claimant’s previous difficulty answering questions. Dr. Guinn noted:

Since that last visit, the patient has apparently refused to return to work. She is considered to be at MMI. She is seen today for a disability rating. She continues to complain of the bilateral pain and numbness, although her moving 2-point discrimination testing was well within the normal range.<sup>9</sup>

Dr. Guinn indicated no disability would be assessed for loss of strength because claimant gave a self-limiting effort during testing. He did allow a permanent partial disability for claimant’s scar because it occurs on a surface exposed to daily friction and qualifies as a disability. Using the *AMA Guides*, Dr. Guinn determined claimant sustained a 6 percent impairment at the right wrist and a 5 percent impairment at the left wrist. Dr.

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<sup>6</sup> Guinn Depo., Ex. 3 at 3.

<sup>7</sup> Guinn Depo. at 12.

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.*, Ex. 4 at 2.

Guinn opined claimant could return to full-duty work, and there was no indication claimant would require additional medical treatment.

Claimant has not worked since April 30, 2012, when she took family leave. Claimant testified the family leave expired July 23, 2012. She also applied for and received unemployment benefits from June 2012 through June 2013. Claimant testified she attempted to contact respondent when informed she could return to work, but received no response. Claimant stated she applied for work at various places, including a temporary services agency, but had not acquired a job. She also applied for Social Security disability benefits, which were denied in December 2013. Claimant testified she is appealing the decision.

Dick Santner, a vocational rehabilitation counselor, met with claimant on November 11, 2013, to assess her employability. Mr. Santner considered claimant's transferrable skills, medical restrictions, and her labor market. He testified he did not feel claimant was realistically employable based on her work history, her age, her residence, and the medical information provided by Dr. Bieri. Mr. Santner noted claimant was difficult to interview, as she would begin to respond to a question, but then slip into a tangent. He testified he had to repeat his questions, and claimant "would talk non-stop . . . if you let her."<sup>10</sup> Mr. Santner indicated claimant had difficulty focusing, and he would not recommend her for hire at this time.

Terry Cordray, a board certified vocational rehabilitation counselor, interviewed claimant at respondent's request on November 26, 2013. Mr. Cordray found claimant is a high school graduate with a valid driver's license, and she previously commuted approximately 38 miles from her home in Overbrook to her job at respondent in the Johnson County area. Claimant informed Mr. Cordray she lived in the country on five acres and cared for her two grandchildren and multiple animals. He found claimant capable of vocational and academic training and capable of being employed in the open labor market. Mr. Cordray testified he determined claimant's employability based on the medical records he reviewed from Drs. Guinn and Bieri. Regarding claimant's personality, Mr. Cordray testified it has never "kept her from working in the past, and [he doesn't] believe [it] is vocationally significant. . . . [He] didn't have any problem doing an interview and keeping her on task."<sup>11</sup>

Robert Barnett, Ph.D., a clinical psychologist and rehabilitation counselor/evaluator, interviewed claimant on March 7, 2014, at her counsel's request to assess her employability. Dr. Barnett determined claimant was not realistically employable at this time, and he would not recommend her to any employers for hire. Further, Dr. Barnett indicated

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<sup>10</sup> Santner Depo. at 13.

<sup>11</sup> Cordray Depo. at 27.

claimant had psychological impairments, but stated he was not offering an opinion as to the cause of these impairments. Dr. Barnett testified:

Her presentation during the interview was I described it as pressured and at times hypomanic with histrionic features, many verbalizations that were circumstantial and tangential. Essentially her presentation during the interview was inappropriate for a professional setting.<sup>12</sup>

Claimant testified she continues to have pain in her wrists and cramping of her hands. She stated the pain interferes with her activities of daily living and affects her sleep.

#### **PRINCIPLES OF LAW**

K.S.A. 44-510c(a)(2) states, in part:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability.

An injured worker is permanently and totally disabled when he is “essentially and realistically unemployable.”<sup>13</sup>

The “existence, extent and duration of an injured workman’s incapacity is a question of fact for the trial court to determine.”<sup>14</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>15</sup>

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<sup>12</sup> Barnett Depo. at 7-8.

<sup>13</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>14</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

<sup>15</sup> See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

ANALYSIS

**What is the nature and extent of claimant's disability?**

K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.<sup>16</sup>

The Court of Appeals, in *Wardlow v. ANR Freight Systems*, adopted a trial court finding that permanent and total disability was:

[B]ased on a totality of the circumstances including [Wardlow's] serious and permanent injuries, the findings of Drs. Prostic and Redford, the extremely limited physical chores [Wardlow] can perform, his age, his lack of training, driving and transportation problems, past history of physical labor jobs, being in constant pain, and constantly having to change body positions.<sup>17</sup>

The Court of Appeals in *Wardlow* also found the trial court's finding that the claimant was permanently and totally disabled because he was essentially and realistically unemployable to be compatible with legislative intent.<sup>18</sup>

In *Lyons v. IBP, Inc.*, the Court of Appeals wrote:

The Board correctly noted that "*Wardlow* still provides precedential guidance regarding what factors should be considered in the factual determination of what constitutes permanent and total disability." Its ruling that "essentially and realistically unemployable" is compatible with legislative intent, comports with the totality of circumstances approach to factually determining permanent total disability.<sup>19</sup>

In *Loyd v. ACME Foundry, Inc.*, the Court of Appeals wrote:

In Kansas, the existence, extent, and duration of an injured worker's disability is a question of fact to be determined from the totality of the circumstances. In *Wardlow*, the claimant was found to be permanently and totally disabled based on his serious

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<sup>16</sup> See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 528, 154 P.3d 494 (2007); citing *Pruter v. Larned State Hospital*, 271 Kan. 865, 875-76, 26 P.3d 666 (2001).

<sup>17</sup> *Wardlow*, *supra*, at 114.

<sup>18</sup> See *Wardlow*, *supra*, at 113.

<sup>19</sup> *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 378, 102 P.3d 1169 (2004).

and permanent injuries, his limitations on physical activity, his age, his lack of training, his driving and transportation problems, his history of physical labor jobs, his constant pain, and his constant switching of body positions. Although the court in *Wardlow* did not examine the claimant's intelligence or education, it did factor in analogous characteristics such as his history of employment in manual labor jobs and lack of training. In Loyd's case, therefore, her lack of education and low intelligence can be considered as part of the totality of the circumstances in determining whether she is now permanently and totally disabled. [Citations omitted.]<sup>20</sup>

More recently, in *Blankley v. Russell Stover Candies, Inc.*, the Court of Appeals wrote:

Whether a worker is capable of engaging in substantial and gainful employment is a factual determination, made by examining the totality of the evidence, which includes, but is not limited to, the claimant's physical activity, age, intelligence, education, lack of training, job history, and constant pain. See *Lyons v. IBP, Inc.*, 33 Kan.App.2d 369, 370-78, 102 P.3d 1169 (2004)(affirming Board finding of permanent total disability on "totality of the circumstances approach" even though no medical doctor rated claimant 100% disabled); *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113–15, 872 P.2d 299 (1993).<sup>21</sup>

In determining if claimant is permanently and totally disabled as a result of her injuries, the Board will consider the totality of the circumstances, which includes, but is not limited to, the claimant's physical activity, age, intelligence, education, lack of training, job history, and constant pain.

Respondent has the burden of overcoming the presumption of permanent total disability created by K.S.A. 44-510c(a)(2).<sup>22</sup> In its attempt to rebut the presumption, respondent relies partially on Dr. Guinn, a court-ordered physician. Dr. Guinn advised claimant to return to work, without restrictions, which is consistent with claimant's testimony that Dr. Lintecum released her to return to work without restrictions. Dr. Guinn wanted claimant to try to work to assess the impact of work activity on claimant's complaints and have repeat neurological testing while claimant was performing work activities.

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<sup>20</sup> *Loyd v. ACME Foundry, Inc.*, No. 100,695 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009).

<sup>21</sup> *Blankley v. Russell Stover Candies, Inc.*, No. 110,014 (Kansas Court of Appeals unpublished opinion filed May 30, 2014).

<sup>22</sup> *McComb v. Royal Caribbean Cruise Lines LTD*, No. 1,043,632, 2010 WL 517328 (Kan. WCAB Jan. 27, 2010).

Relating to claimant's physical limitations, Dr. Guinn testified claimant provided inconsistent effort during strength testing, which made it impossible to assess claimant's functional capability. Dr. Guinn believed claimant could perform 20 of the 23 tasks listed by Mr. Cordray. Of the other three, Dr. Guinn said he did not know if claimant could perform them, because of claimant's inconsistent effort.

Respondent took the deposition of Dr. Ruhlman, who diagnosed fibromyalgia. Dr. Ruhlman testified the fibromyalgia caused claimant to experience widespread pain, and fibromyalgia is the cause of claimant's hand pain. Dr. Ruhlman was not asked if the fibromyalgia had a relationship to claimant's work activities with respondent.

Respondent also relied on the vocational opinions of Mr. Cordray to support its argument that claimant is not permanently and totally disabled. Mr. Cordray noted Dr. Guinn released claimant to full duty. Mr. Cordray also opined claimant could obtain employment in her labor market. Mr. Cordray's opinions regarding claimant's access to the labor market are not persuasive, as he lists jobs in locations to which claimant does not have access, including Holton, Sabetha, and Seneca, Kansas, Falls City, Nebraska, and Calgary and Vancouver, Canada. Mr. Cordray's opinions are not persuasive.

In response to respondent's argument that it rebutted the presumption of permanent total disability, claimant relies on the restrictions placed on her by Dr. Bieri as a basis of her inability to obtain employment. Dr. Bieri provided the only restrictions of significance found in the record. Dr. Bieri placed the restrictions on claimant even though he felt claimant was telling him things that were inconsistent with the results of her testing. Dr. Bieri was not aware claimant had been prescribed a variety of medications for depression, pain and sleep problems.

The Board gives more weight to the opinions of Dr. Guinn over the opinions of Dr. Bieri. Dr. Guinn examined claimant on multiple occasions and provided a neutral opinion. Dr. Guinn's opinion on permanent restrictions is consistent with claimant's statement acknowledging she was released without restrictions by Dr. Lintecum.

In addition to the opinions of Dr. Bieri, claimant relies on the testimony of Dr. Barnett and Mr. Santner as proof she is essentially and realistically unemployable. Dr. Barnett wrote claimant would be seen as impaired psychologically, not psychologically impaired. Dr. Barnett provided no testing or diagnosis to support his opinion. Dr. Barnett agreed that, notwithstanding claimant's potential psychological issues, she had been successful finding employment prior to her injury. Dr. Barnett's observation that claimant spoke with an elevated affect and speech, and spoke in a manner intended to draw attention, appear to be personality traits rather than a psychological barrier. Dr. Barnett's opinions are not persuasive.

Mr. Santner provided an opinion that claimant is essentially and realistically unemployable based upon the restrictions of Dr. Bieri and claimant's personality traits. Mr.

Santner's opinion claimant's personality limited her ability to find work is inconsistent with the fact that, prior to her injury, claimant was capable of finding employment. There is no evidence claimant's personality changed after her accident. Mr. Santner's reliance solely on Dr. Bieri's restrictions does not provide an accurate portrayal of the extent to which claimant has access to the labor market.

Considering the totality of the circumstances, including the findings of Dr. Guinn; claimant's collecting unemployment; claimant's ability to find employment in the past, notwithstanding her personality impairment; the recorded inconsistent effort on strength testing with Dr. Guinn and her statements to Dr. Bieri that were inconsistent with his findings, the Board finds respondent successfully rebutted the presumption of permanent total disability.

The ALJ adopted the impairment rating provided by Dr. Guinn. The Board agrees with this finding. Dr. Guinn examined claimant on two occasions. His impairment evaluation and rating is impartial and supported by the *AMA Guides*.

#### **CONCLUSION**

Respondent rebutted the presumption of permanent total disability. Claimant suffers a 5 percent impairment to the left forearm and a 6 percent impairment to the right forearm as a result of her accidental injury sustained on or about October 28, 2010.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 12, 2014, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2014.

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BOARD MEMBER

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BOARD MEMBER

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